

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  QWEST CORPORATION and U.S. CELLULAR CORPORATION,  Complainants,  v.  EAST BUCHANAN TELEPHONE COOPERATIVE,  Respondent.	DOCKET NOS. FCU-04-42, FCU-04-43
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**ORDER RESCHEDULING HEARING AND COMPELLING  
RESPONSES TO DATA REQUESTS**

(Issued October 27, 2004)

On August 13, 2004, Qwest Corporation (Qwest) filed with the Utilities Board (Board) a "Complaint for Emergency Injunctive Relief" (the Complaint) naming East Buchanan Telephone Cooperative (EBTC) as respondent. Qwest alleged that EBTC "threatened to 'begin blocking any traffic received from Qwest that is not properly identified as Qwest toll traffic on August 16, 2004.'"<sup>1</sup> The affected traffic would include calls that Qwest describes as "wireless transit traffic," that is, calls that originate with a wireless service provider and are delivered to Qwest for transport to other carriers and their end users.<sup>2</sup> Qwest alleged that EBTC's threat to block the

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<sup>1</sup> Qwest Complaint, ¶ 5.

<sup>2</sup> Qwest Complaint, ¶ 1.

disputed traffic, if completed, would violate Iowa Code §§ 476.20, 476.100(1), 476.100(3), 476.100(5), 476.101(9)"c," 477.5, 477.6, and 477.13 (2003), along with 199 IAC 22.5(13).<sup>3</sup>

On August 13, 2004, based solely on the allegations of the Complaint filed by Qwest, the Board found that EBTC intended to block certain telephone calls, commencing on Monday, August 16, 2004. The Board further found that such action by EBTC would create a danger to the public safety because "a wireless service subscriber whose carrier uses Qwest's transit service to complete calls would be unable to call family, friends, police, or a doctor in EBTC's exchange in an emergency."<sup>4</sup> Based on these (and other) findings, the Board issued a temporary injunction pursuant to Iowa Code § 17A.18A (2003), prohibiting EBTC from blocking the calls. Because the Board's findings were based solely on the allegations of Qwest's Complaint, and because EBTC had not had an opportunity to respond to the allegations, the Board also found that its emergency adjudication should be temporary in nature and that each of the Board's findings, and the injunction itself, should be reconsidered by the Board after EBTC had an opportunity to respond to the Complaint and Qwest and any other interested persons have had an opportunity to reply.

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<sup>3</sup> For a detailed description and analysis of the specific arguments made by Qwest and USCC, and responsive arguments made by EBTC, please refer to the Board's "Order Continuing Temporary Injunction, Docketing and Consolidating Cases, and Setting Procedural Schedule," issued September 14, 2004.

<sup>4</sup> Complaint, ¶ 9, footnote omitted.

Also on August 13, 2004, U.S. Cellular Corporation (USCC) filed a complaint and request for emergency ruling complaining of the same EBTC actions, asserting that EBTC is trying to re-litigate questions the Board has already decided in the Board's ruling in the "Proposed Decision and Order," issued in *Re: Transit Traffic*, Docket No. SPU-00-7, on November 26, 2001, and seeking an order prohibiting blocking and summarily resolving the complaint against EBTC on the basis of Board precedent. USCC also sought consolidation of its complaint (identified as Docket No. FCU-04-43) with the Qwest complaint (identified as Docket No. FCU-04-42).

On August 18, 2004, EBTC filed a response to the Board's temporary injunction and an answer to Qwest's complaint. The next day, EBTC filed a corrected response and answer, correcting a typographical error but making no substantive changes. EBTC argued that the temporary injunction should be removed for a variety of reasons, including the fact that EBTC did not propose to block any Qwest-originated traffic. EBTC effectively asserted that Qwest lacked standing to protest the proposed blocking of non-Qwest-originated traffic. EBTC asserted it was planning to block unauthorized calls delivered in an unauthorized manner, as permitted by 199 IAC 22.5(13)"g."

On August 20, 2004, EBTC filed an answer to the USCC complaint, arguing (among other things) that if EBTC is permitted to block the disputed traffic, USCC's customers would only be unable to complete calls if USCC refuses to re-route its

traffic. EBTC also resisted consolidation of the two complaints, arguing the two cases are different.

On August 23, 2004, USCC filed a reply to EBTC's response, supporting continuation of the temporary injunction.<sup>5</sup>

On August 24, 2004, Qwest filed a reply to EBTC's response, supporting continuation of the temporary injunction, arguing there is no injury, irreparable or otherwise, that will result if the Board refuses to permit EBTC to unilaterally block the disputed traffic.<sup>6</sup>

On September 3, 2004, EBTC filed a withdrawal of its request for an immediate hearing on the temporary injunction and a motion to dissolve the injunction and withdrew its objection to the motion to consolidate the two cases.

Based on the findings the Board made in its order of August 13, 2004, the Board denied EBTC's request to dissolve the temporary injunction, noting that it continued to be concerned that the call blocking proposed by EBTC would result in the blocking of emergency calls that originate on a wireless carrier, such as the tow truck example offered by Qwest.

The Board determined that blocking telephone calls on a carrier basis will almost always present an immediate danger to the public health, safety, or welfare, because the blocking carrier cannot promise, let alone guarantee, that it will block only non-emergency calls. The carrier cannot even offer reliable assurances that

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<sup>5</sup> The reply was filed in both dockets.

<sup>6</sup> Qwest Reply, p. 2.

most emergency calls will be completed; that would require a call-by-call real-time analysis that is not, on this record, a realistic possibility.

The Board stated:

The bottom line is that emergency calls take all forms and can be directed to just about any telephone number. The only way to avoid blocking emergency calls is to avoid blocking. The Board continues to find that EBTC's proposed blocking involves an immediate danger to the public health, safety, or welfare, as described in Findings of Fact Nos. 2 and 3 in the Board's August 13, 2004, order. The temporary injunction will not be dissolved, but will instead continue until otherwise ordered by the Board.<sup>7</sup>

Additionally, the Board granted the motion to consolidate and established an expedited procedural schedule for the further conduct of this proceeding.

Late in the day on October 25, 2004, USCC filed its "Motion to Grant Summary Disposition for Failure to Respond to Discovery or For Motion to Compel and, Continuance of Hearing." The impetus for the motion appears to be the failure of EBTC to give timely responses to data requests propounded by USCC. According to USCC, it electronically served data requests upon EBTC on October 8, 2004. This was followed up with service by hand-delivery to counsel for EBTC on October 11, 2004.<sup>8</sup> According to the Board's September 14, 2004 order, EBTC's responses were due October 18, 2004, at the latest.

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<sup>7</sup> Order Continuing Temporary Injunction, Docketing and Consolidating Cases, and Setting Procedural Schedule, pp. 8-9.

<sup>8</sup> The Board provided that all data requests and motions should be served by facsimile transfer or by electronic mail, in addition to United States mail. Additionally, the Board shortened the time for filing responses or objections to data requests and motions to five days from the date the motion is filed or the data request is served, pursuant to 199 IAC 7.7(2) and (11). "Order Continuing Temporary Injunction," p. 11.

According to its motion, on Saturday, October 23, 2004, USCC sent an e-mail notification to counsel for EBTC indicating that if responses were not received by "2:00 p.m. on Monday, October 23 [sic], 2004, USCC may have to request that the hearing in this matter be continued."<sup>9</sup> As of late in the afternoon on October 25, 2004, USCC asserts that it still has not received any response from EBTC to the data requests served more than two weeks ago.

The hearing in this docket is currently scheduled for October 27, 2004. USCC asserts that even if responses were to be received between the filing of its motion and the commencement of the hearing, it will not have a fair opportunity to review any responses and effectively utilize them in examination of EBTC witnesses, as is its right. USCC requests the Board compel production and delay the hearing. Alternatively, USCC suggests that the Board strike the testimony of EBTC's witnesses or grant a summary disposition without hearing and make the existing injunction permanent.

The Board is concerned about EBTC's failure to provide timely responses or objections to properly propounded data requests. At the same time, however, USCC's actions are also a source of concern. It appears that after the data requests were served, USCC made no attempt to contact EBTC until sending a Saturday e-mail with a Monday deadline. Thus, both parties have failed to make a good faith

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<sup>9</sup> Exhibit B to the Motion filed by USCC shows that the e-mail was sent on October 23, 2004. Although the actual wording of the e-mail indicates that responses were expected on "Monday, October 23, 2004," the Board notes that a reasonable interpretation would be that USCC expected to receive the responses on Monday, October 25, 2004.

attempt to resolve this discovery dispute. Nonetheless, the Board believes the public interest requires a fully-developed record, making postponing necessary.

The Board will postpone the hearing currently scheduled for October 27, 2004 to November 1, 2004. Additionally, the Board will order EBTC to provide responses to each of the fifteen data requests by no later than close of business on October 27, 2004.

**IT IS THEREFORE ORDERED:**

1. The "Motion to Grant Summary Disposition for Failure to Respond to Discovery or For Motion to Compel and, Continuance of Hearing" filed on October 25, 2004, by United States Cellular Corporation is granted, in part, as set forth in this order.

2. The procedural schedule previously ordered by the Board in its September 14, 2004, order is altered as follows:

d. A hearing for the purpose of receiving testimony and cross-examination of all testimony will commence at 9 a.m. on November 1, 2004, in the Board's hearing room at 350 Maple Street, Des Moines, Iowa. Parties shall appear at the hearing one-half hour prior to the time of hearing to mark exhibits. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at 515-281-5256 to request that appropriate arrangements be made. The Board has allotted a maximum

of one day for this hearing. The briefing schedule will be discussed at the end of the hearing.

3. East Buchanan Telephone Cooperative is directed to provide responses or objections to the data requests propounded by United States Cellular Corporation no later than close of business on October 27, 2004.

**UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

Dated at Des Moines, Iowa, this 27<sup>th</sup> day of October, 2004.